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No. 07-793

IN THE

Supreme Court of the United States

UNITED AMERICAN INSURANCE COMPANY,
Petitioner,

v.

NATALIE MERRILL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where no jury instruction was requested on the proper use of "harm to nonparties" for assessing punitive damages, where the Petitioner's other requests for jury instructions on punitive damages were granted, where there was no assignment of error on appeal either relating to "harm to nonparties" or the amount or constitutionality of the punitive damages assessed, where no court below considered and ruled on the issue presented in this Question, and where the issue was improperly presented as a new issue to the court below only on a motion for reconsideration, is it appropriate for this Court to grant, vacate and remand (GVR) this case in light of *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), in order to force the court below to reconsider its result even though the issue now raised by Petitioner was procedurally waived under longstanding Mississippi law?

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Natalie Merrill respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Mississippi Supreme Court's decision in this case.

In *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), this Court recognized that it was entirely proper to present evidence and argument that others were harmed by a defendant's egregious misconduct to further the factfinder's reprehensibility analysis in the assessment of punitive damages. This Court stated, however, that direct punishment for such harm to others was prohibited by the Due Process Clause. To avoid confusion over the proper use of such evidence, *Williams* held that "where the risk of . . . misunderstanding is a significant one," then "a court, *upon request*, must protect against that risk." *Id.* at 1065 (emphasis added).

Petitioner United American Insurance Company which made no such request at trial and assigned no error on the issue (or any other issue regarding the amount or constitutionality of punitive damages assessed by the jury) in its appeal, now claims that it only discovered the issue and the *Williams* ruling some seven months after this Court handed it down, Pet. at 21, and only after the Mississippi Supreme Court unanimously upheld the jury's verdict. Despite the procedural bar to its petition, it nonetheless asks this Court to issue a GVR to force reconsideration in light of *Williams* by the Mississippi Supreme Court even though United never properly raised the issue before that court.

This Court should decline Petitioner's invitation to erase Petitioner's waiver of any issue of nonparty-harm issue it now claims exists because longstanding Mississippi procedure provides an adequate and independent ground for final disposition.

STATEMENT OF THE CASE

Petitioner United American Insurance Company (hereinafter "United") sells high-priced insurance policies to the elderly to cover future burial costs. The policies are issued without conducting any real underwriting analysis. The company advertises that its coverage is "immediate" and that a policyholder's "protection can never be cancelled as long as premiums are paid on time." Tran. Vol. 30 at 616 (incorporating Ex. K); 677-82. Even so, the record establishes that United denies up to 95% of claims where the insured dies within the first two years of coverage. Tran. Vol. 30, 609-610, 616; Vol. 31 at 792.

Respondent Natalie Merrill was the beneficiary of a United policy purchased on the life of her husband, Robert, eight months before he died of a heart attack in 1997. An agent for United filled out the application form while interviewing Robert and Natalie. Pet. at 13a. The subsequent coverage dispute centered on the answer to Question 6, which asked whether Robert had been treated for congestive heart failure within the past three years.[1]

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[1] Petitioner misrepresents this question in its Petition by leaving out the question's time restriction, which limits the inquiry on treatments to those within the prior three years. *Compare* Pet. at 6 (attempting to portray *any* history of

Robert truthfully answered that he had not been so treated within the past three years, but had been under a doctor's care for that condition some two decades earlier, in 1978 and 1979. United's agent told him that the company did not care about any treatments older than three years and then marked the answer as "no." Pet. at 13a.

The purchased policy was supposed to pay $5,000 (to cover burial expenses) for which the Merrills paid all premiums due. United denied Natalie's claim in 1997, 278 days after it was filed, without conducting any meaningful investigation. United admitted at trial that the only basis for denying the claim was its conclusion that the Decedent had congestive heart failure within the three years prior to the application (Tran. Vol. 28 at 368-69), even though no records in the claim file contained the words "congestive heart failure." Tran. Vol. 28 at 295-299; 370-371. Ultimately, Decedent's treating physicians confirmed that, in fact, Mr. Merrill did not have and was not treated for congestive heart failure in the three years preceding his insurance application. Ex. G at 61, 72 & 75-76; Ex. I at 58-59. A timely subsequent resubmission of the claim by Natalie resulted in another denial of coverage two years later, in the year 2000. Pet. at 2a.

Natalie, who at age 71 took a job in a casino during the graveyard shift to pay off a loan she used to pay her husband's burial costs in the absence of the insurance payment due from United, brought

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congestive heart disease as disqualifying) and Pet. at 13a, 27a (where the Mississippi Supreme Court notes that the three-year period posed by the questionnaire was the only relevant time period).

suit. During the course of the trial, United engaged in gross discovery misconduct. R., Vol. 6 at 801-02. Trial was continued five separate times, three times over Merrill's strenuous objections. United stipulated that its total defense fees and expenses, through trial, estimated in good faith, were $710,000 to counter Natalie Merrill's claim. Ex. P at 22; Tran. Vol. 32 at 941-45.

On August 6, 2004, more than seven years after Mr. Merrill's death and four years after suit was filed, the jury unanimously assessed $500,000 in compensatory damages (reduced through remititur to $200,000) and $900,000 in punitive damages against United. In addition, $527,474.69 in attorneys' fees, costs and expenses were awarded by the court against United.

On appeal to the Mississippi Supreme Court, United primarily complained about the trial court's refusal to admit certain medical records into evidence. As it concedes in its Petition to this Court and as was acknowledged by the Mississippi Supreme Court, United never contested the amount of punitive damages awarded, Pet. at 2 & 45a, nor did it complain that the jury was improperly instructed on punitive damages. In fact, the trial judge gave the jury three instructions on punitive damages requested by United. R, Vol. 18, 2670-75. On punitive damages, United's only assignment of error to the Mississippi Supreme Court, by its own admission, consisted of asserting that the judge erred in "submitting the punitive-damage issue to the jury." Pet. at 8. The Mississippi Supreme Court held that there was no error in submitting the issue to the jury and, *sua sponte,* further held, in a single paragraph, that the punitive damages were not

unconstitutionally excessive. Pet. at 39a-48a. This Court's decision in *Williams* does not bear on the issues decided by the Mississippi Supreme Court.

This Court decided *Williams* on February 20, 2007. United's reply brief before the Mississippi Supreme Court was filed on March 14, 2007 and even then did not cite or raise any issue under *Williams,* a high-profile decision that received considerable attention in both the popular and legal press, as well as within the Bar and the legal academy.[2] Nor did the nonparty-harm issue come up during oral argument on June 5, 2007. Pet. at 45a. The Mississippi high court's decision in this case was rendered on September 6, 2007. Unsurprisingly, the court did not discuss any "harm to others" issue, as it was never presented to them, not even by notice of supplemental authority.

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[2] *See, e.g.,* Robert Barnes, *Justices Overturn Tobacco Award; $80 Million Penalty Is Called Excessive,* WASH. POST, Feb. 21, 2007, at A1; Joan Biskupic, *Justices Toss $79.5M Award to Smoker's Widow,* USA TODAY, Feb. 21, 2007, at 3A; *Insurers Hail Supreme Court's Curtailing of Punitive Damages,* INSURANCE J. (Feb. 21, 2007), *available at* http://www.insurancejournal.com/news/national/2007/02/21/77076.htm; Robin Kurtis Craig, *2007 Supreme Court News,* 32-SPG ADMIN. & REG. L. NEWS 18 (Spring 2007). Even before the decision, the *Williams* case was well-publicized, including in local newspapers in Biloxi, where the *Merrill* case was tried. *See, e.g.,* David Savage, *Great Taste, Less Filling; The High Court's New Term Is Light On Load, But The Subjects Are Still Spicy,* 92-Oct. A.B.A. J., 12 (2006); Mark Sherman, *How Much is Too Much? High Court Considers $79.5M Award,* BILOXI (MS) SUN HERALD, Nov. 1, 2006, at B10; *Supreme Court to Review Philip Morris Appeal,* BILOXI (MS) SUN HERALD, at B10 (May 31, 2006).

On September 20, 2007, a full seven months after this Court's decision in *Williams* and the jurisdictional deadline for any such motion, United filed a motion for rehearing before the Mississippi Supreme Court, asking for reconsideration in light of *Williams,* asserting that it had been utterly unaware of the decision before that time. After that motion was denied without opinion, as is the usual practice, United filed its petition for certiorari in this Court.

REASONS FOR DENYING THE PETITION

I. PETITIONER FAILED TO RAISE THE ISSUE IT NOW PRESENTS TO THIS COURT IN THE MISSISIPPI COURTS AND WAIVED ANY ERROR

This Court has repeatedly adhered to its declaration that "ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 234 (1976). *See also Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 379 n.5 (1996) (Court "generally do[es] not address arguments that were not the basis for the decision below."); *Duignan v. United States,* 274 U.S. 195, 200 (1927) (same).

While this limitation on issues eligible for review comprises a prudential consideration, rather than a restriction on jurisdiction, this Court has made plain that it will not depart from that general rule absent a showing of "'unusual circumstances.'" *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992) (citation omitted). *Compare* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2805, at 57-58 ("A principle that strikes very deep is that a new

trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result.").

Permitting a party, after both trial and appeal, to "discover" new arguments in order to keep a case alive after it has exhausted appeals in a State's court system undermines the orderly administration of justice, as well as fundamental precepts of fairness. A court properly looks askance at such a request in order to prevent parties from withholding objections to instructions at trial in order to preserve a ground for appeal. In the federal system, Federal Rule of Civil Procedure 51 stands as a bulwark against such misuse of the system. In Mississippi, the same uncompromising approach is found in that State's analogue Rule 51. *See* Miss. R. of Civ. P. 51(b)(3) ("No party may assign as error the granting or the denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury.").

Raising the issue for the first time in a motion for rehearing in the state supreme court, which under its rules will not entertain a new issue at that late stage, *see* discussion *infra* at pp. 15-17, does not constitute presentation and denial by a lower court, as United contends it does.[3] This case presents no warrant to depart from the sound policy of denying

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[3] If United's motion for reconsideration in light of *Williams* *did* constitute presentation and denial, then its application for a GVR should be denied anyway because *Williams* is no longer an "intervening decision," but was fully considered.

certiorari to issues first raised in the petition to this Court.

II. NONE OF PETITIONER'S ARGUMENTS EXCUSE ITS FAILURE TO REQUEST AN INSTRUCTION OR ARGUE ITS NEW ISSUE TO ANY COURT BELOW

No showing of unusual circumstances or gross injustice was made in United's Petition nor could it have been made. United freely admits, as the Mississippi Supreme Court found, that it did not contest the amount of punitive damages awarded below. Pet. at 2; Pet. at 45a. It did not ask for nor was it denied a jury instruction that would have limited any evidence or argument concerning nonparty harm[4] to the assessment of reprehensibility, rather than for direct punishment.

United now makes three arguments to overcome the procedural barrier to its assertion of a new issue before this Court. First, United claims that its generic assertions about the unconstitutionality of punitive damages in its responsive pleading at the outset of the case preserved its new claim. Pet. at 6-7. Second, it asserts that its meritless evidentiary objections were sufficient to now aver an instructional error never presented at trial or appeal and never addressed below. Pet. at 13-14. Finally, it claims that its discovery of the *Williams* decision after the

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[4] Respondent disputes whether any evidence or argument was made that posed a substantial risk of jury confusion on the proper use of "harm to nonparties" evidence. *See* p. 25-26 *infra*.

Mississippi Supreme Court ruled against it (and seven months after this Court issued *Williams*) justifies asking this Court to require the Mississippi Supreme Court to reconsider the issue that was never properly presented to them and never considered before. None of these arguments is meritorious.

A. Generic Constitutional Objections Cannot Preserve an Issue or Justify Its Assertion Now

United claims that it sufficiently preserved a *Williams* issue by raising generic constitutional objections to any award of punitive damages in this case. It states, for example, that its Answer to the lawsuit asserted that "Merrill's claim for punitive damages violated the Mississippi and United States Constitutions." Pet. at 6. That Answer further "contended that '[t]he procedures pursuant to which punitive damages are awarded' 'fail to provide a reasonable limit on the amount of the award against the defendant' and 'fail to provide sufficiently specific standards or guidelines under which the trier of fact is permitted to award such damages,' thereby violating the due process provisions of the Fourteenth Amendment and the Mississippi Constitution." Pet. at 6. In an amended Answer, it further asserted that "[a]ny punitive damage award . . . is subject to the standards and limitations against the imposing of excessive awards under the Due Process Clause," citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). Pet. at 6-7.

Critically, it did not pursue any of these arguments during the subsequent phases of the litigation.[5]

None of these assertions in the pleadings constitutes an objection that the jury may have misused any evidence concerning harm to nonparties. At most, by its citation of *State Farm* and the Mississippi court's discussion and rejection of any excessiveness issue, United preserved a due process objection to the size of the award against it, which is precisely the issue that this Court chose *not* to address in *Williams*. United, however, has not petitioned this Court with a claim of excessiveness. Instead, its petition is limited to whether the jury directly punished United for harm to nonparties, an issue not encompassed within these boilerplate assertions in the pleadings.

As in most jurisdictions, Mississippi's courts require that objections and assignments of error be advanced with significant specificity. Failure to do so constitutes waiver. Thus, Mississippi's Supreme Court has had occasion to

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[5] United also asserts it objected to certain punitive-damage instructions and to the judge's refusal to give other instructions it tendered, but does not specifically describe these instructional issues in its Petition because none of them posed the issue decided in *Williams* and none of the punitive-damage instructions were assigned as errors before the Mississippi Supreme Court. That court extensively discussed United's few assignments of instructional error solely in relation to the award of compensatory damages, which is not at issue here. These various objections, unrelated to punitive damages, are manifestly insufficient to preserve United's new issue, just as objecting to "liability" would be insufficient to preserve a specific issue within the general subject area of liability.

> reiterate the necessity of counsel making specific objections in order to preserve a question for appellate review. We have said many times that general objections will not suffice. Objections to the admissibility of evidence must specifically state the grounds, otherwise, the objection is waived. General objections to [ ] comments in closing arguments do not preserve the point for review. Errors based on the granting of an instruction will not be considered on appeal unless specific objections stating the grounds are made in the trial court.

Oates v. State, 421 So.2d 1025, 1030 (Miss. 1982) (citations omitted). Federal courts utilize the same standard. *See, e.g., American Fid. & Cas. Co. v. Drexler,* 220 F.2d 930, 934 (5th Cir. 1955) (citation omitted) (it is "the duty of counsel to state the ground of his objection and, in proper instances, the authority which supports his position. Otherwise the point may not be preserved for appeal.").

United failed to make objections at trial sufficient to preserve its Question Presented in its appeal to the Mississippi Supreme Court. Perhaps even more telling, United waived the issue by failing to assign the issue as error on appeal.[6] As this Court

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[6] Failure to follow state procedural rules to preserve allegations of instructional error is an "altogether commonplace type of procedural rule that represents an adequate and independent state law ground" for denial of certiorari. *Smith v. Texas.*, 127 S.Ct. 1686, 1699 (2007) (Alito, J., joined by Roberts, C.J., Scalia and Thomas, JJ, dissenting).

has held, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States,* 321 U.S. 414, 444 (1944).

The rules of civil procedure governing both the Mississippi and federal courts similarly require that objections to jury instructions, as well as requests for instructions, be made at trial, prior to submission of the case to the jury, in order to provide the trial judge with an opportunity to correct any error. *See* Miss. R. Civ. P. 51 and Fed. R. Civ. P. 51. The requirement is a venerable one. *See Mississippi Pub. Serv. Co. v. Collier,* 183 So. 379, 381 (Miss. 1938). Failure "to object at the trial level constitutes a waiver to raise the issue on appeal." *Clark v. Illinois Cent. R.R. Co.,* 872 So.2d 773, 779 (¶ 13) (Miss. Ct. App. 2004) (citation omitted).

United made no such specific objection at trial and requested no instruction. Instead, it now attempts to assert that a generic constitutional objection to punitive damages generally *at the pleadings stage* is sufficient to raise its new issue now. This Court has never countenanced such an attenuated assertion. Instead, it has recognized that a "generic reference" to the Constitution "is not sufficient to preserve a constitutional claim." *Taylor v. Illinois,* 484 U.S. 400, 406 n.9 (1988). Thus, for example, in an earlier punitive damages case, this Court held that an attack on an allegedly excessive punitive damage award that asserted a violation of the Excessive Fines Clause of the Eighth Amendment, made applicable to the States through

the Fourteenth Amendment, did not preserve an argument that the same operative facts violated the Due Process Clause of the Fourteenth Amendment, despite the Petitioners' argument that the due-process objection was within their "clear intendment." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

United's generic constitutional objections to punitive damages generally cannot justify its attempt to raise the issue that was before this Court in *Williams* at this late stage, having failed to present it properly at trial or to the Mississippi Supreme Court, and only and improperly well after they lost their appeal on other issues.

B. United's Other Actions at Trial and on Appeal Did Not Preserve the Issue it Raises in its Petition

In addition to the patently insufficient generic constitutional objections discussed above, United asserts that its objection to the *admission* of evidence and to closing arguments that supposedly involved harm to nonparties preserved its right to ask for a jury instruction that it never actually requested. *See* Pet. at 14-15 ("United's trial counsel objected repeatedly that evidence of 'other claims' 'couldn't possibly be relevant' to any issue in the case" and "promptly objected" to closing argument that supposedly "appealed to nonparty injuries").

The trial court, of course, properly denied United's motion to exclude any evidence of nonparty injury and that ruling was consistent with this Court's subsequent holding in *Williams*. There, this Court declared that "[e]vidence of actual harm to

nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." 127 S.Ct. at 1064. Thus, on the one issue addressed in *Williams* that United raised at trial, this Court's opinion favors the decisions rendered by the Mississippi courts and provides no basis for breathing new life into this matter at this late stage.

The evidentiary issue, however, is not the issue that United raises before this Court. Instead, its Petition asks this Court to direct the Mississippi Supreme Court to consider whether a jury instruction clarifying the proper uses of such evidence should have been given, even though no such instruction was proffered or requested by United at trial and thus no such request was ever denied.

Nor was the issue presented to and decided by the Mississippi Supreme Court. It is therefore not one of those instances, despite United's contrary assertion, where a "'Federal question was raised in a court below . . . [and] actually considered and decided.'" Pet. at 3, quoting *Orr v. Orr*, 440 U.S. 268, 274-275 (1979) (citations omitted). The Mississippi Supreme Court briefly addressed a substantive due process issue concerning whether the punitive damages were excessive and found they were not. Pet. at 46a. That court was not asked to address the nonparty-harm issue or whether there was any "unreasonable and unnecessary risk of any such confusion occurring" so that some form of clarification was needed. *Williams*, 127 S.Ct. at 1065. The Mississippi Supreme Court also did not address that issue *sua sponte*.

Nor was the trial court asked to address any references to nonparties in closing argument with a clarifying jury instruction. Instead, United made a generalized objection insufficient to preserve any appellate issue, *see Oates*, 421 So.2d at 1030, and which it utterly abandoned on appeal.

Instead, the first time an issue was raised about possible jury confusion and the need for a clarifying instruction was in a motion for rehearing after the Mississippi Supreme Court rendered its decision in this case on September 6, 2007. Denial of the reconsideration motion without opinion cannot be deemed a consideration of the merits of the claim, as United claims, for it is the equivalent of having never raised the issue at all.

As in the federal courts, a motion for reconsideration is not available to raise new issues, absent "extraordinary circumstances." *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999) (noting as well, "generally speaking, we will not consider an issue raised for the first time in a Motion for Reconsideration."). United's motion for rehearing before the Mississippi Supreme Court was a misuse of the rehearing procedure and thus cannot count as putting the issue in this Petition before that court. The Mississippi Supreme Court has long held that the "purpose of a petition for rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not included in the appellant's original brief to this [C]ourt." *MST, Inc. v. Mississippi Chem. Corp.*, 610 So.2d 299, 304 (Miss. 1992). The rehearing process exists only to correct errors in the opinion written. In explaining this limited purpose, the Mississippi Supreme Court has declared that it "cannot misapprehend or overlook

that which is not presented for our review." *Id.* Mississippi's appellate rules reinforce that limitation; a motion for rehearing must "call attention to specific errors of law or fact which the opinion is thought to contain." Miss. R. of App. P. 40(a). It is not a vehicle for raising new issues. *See also White v. State*, 761 So.2d 221, 225 (¶ 22) (Miss. Ct. App. 2000) ("A rehearing does not encompass a new set of arguments; therefore, it was improper for [petitioner] to raise a new legal or factual argument in his motion for rehearing.").

Mississippi has long followed the common-sense rule that, "[a]s always, an appellant is not entitled to raise new issues on appeal since to do so denies the trial court the opportunity to address the matter." *Touart v. Johnston*, 656 So.2d 318, 321 (Miss. 1995). *See also Educational Placement Servs. v. Wilson*, 487 So.2d 1316, 1320 (Miss. 1986) (calling it a "sound principle that this Court sits to review actions of trial courts and that we should undertake consideration of no matter which has not first been presented to and decided by the trial court."). *Compare Payne v. McNeeley*, 85 So. 197, 197 (Miss. 1920) ("All errors and irregularities therein in the original record, and which might have been corrected by the first appeal, must, on the second appeal, be regarded as settled and adjudicated.").

In a case with timing issues similar to this one, the Mississippi Supreme Court found that a motion for rehearing raised issues not properly preserved and thus ineligible for review. In *Brandau v. State*, 662 So.2d 1051 (Miss. 1995), a criminal defendant lost the appeal of his conviction before the Mississippi Supreme Court but then petitioned for

rehearing on the basis of an intervening decision of that same court, which found a similar indictment to be defective. The court, however, rejected the bid for rehearing because the petitioner "failed to object to the form of the indictments at trial." *Id.* at 1053. That failure was fatal to his request for rehearing. In contrast to the movant for rehearing in *Brandau,* the defendant in the intervening case had "objected to the indictment at trial, on his original brief to this Court and in his response to the State's Petition for Rehearing, whereas [the *Brandau* petitioner] attempts to raise the issue only at the time of filing his Petition for Rehearing." *Id.* at 1054.

United's petition suffers the same fatal defect identified in *Brandau*. It did not raise any pertinent instructional objection at trial, and it did not raise any "harm to nonparties" issue before the Mississippi Supreme Court prior to its petition for rehearing, even though there was ample opportunity. It may not claim that the issue was presented and decided below through its rehearing motion.

C. United's September "Discovery" of this Court's February Decision in *Williams* Cannot Justify a GVR

United's final attempt to justify its request that this Court assume jurisdiction in this matter is based on its ignorance of this Court's ruling in *Williams* until late September, after the Mississippi Supreme Court had already ruled unanimously against its appeal. Pet. at 21 (claiming in its motion for rehearing that it was "simply unaware of the decision"), 26. Being unaware of potentially relevant caselaw cannot excuse United's failure to raise the issue properly in the Mississippi courts for two

fundamental reasons: (1) United still needed to raise the issue at trial and on appeal, and (2) its ignorance of the decision does not constitute excusable neglect.

1. The Subsequent Ruling in *Williams* Does Not Excuse a Failure to Raise the Issue at Trial or Assign Error on Appeal

United asserts that *Williams* changed "the constitutional landscape relevant to the punitive-damages award at issue here fundamentally . . . after the bulk of the state-court briefing in this case was completed" and could not have been anticipated, thus excusing its failure to raise the issue at trial or on appeal. Pet. at 4. Such an assertion is both inaccurate and irrelevant. Other defendants in other cases, such as Philip Morris in *Williams*, anticipated the ruling, made appropriate objections at trial, and requested a jury instruction that attempted to clarify the role of nonparty harms in assessing punitive damages. *See, e.g., Williams*, 127 S.Ct. at 1064; *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1015 (9th Cir. 2007); and *White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007).

Prudent counsel would have understood the need to lay a foundation on this issue from previous caselaw. In *State Farm*, this Court put counsel on notice of this issue and squarely held that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis." 538 U.S. at 423. In fact, *Williams* did not overturn a previously existing understanding of the law upon which United could claim it detrimentally relied. *See,*

e.g., Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 427 (2004) (suggesting the need for a harm-to-nonparties instruction in light of *State Farm*).

In *Williams*, this Court also treated the issue as presaged by earlier decisions, stating that it could "find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. . . . [Instead,] we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*." 127 S.Ct. at 1063.

Regardless of whether the ruling in *Williams* could have been predicted, an unanticipated turn in the law, by itself, does not justify an application for a GVR, where the issue was never properly raised below. This Court's GVR jurisdiction is limited to those matters "lawfully brought before it for review." 28 U.S.C. § 2106. Interpreting the scope of that authority, this Court has recognized a GVR is warranted only when "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, *reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.*" *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (emphasis added).

Obviously, where the issue was never properly presented to or decided by the lower court, the decision cannot rest on a premise that the court would now reject. Thus, on the Question Presented by United's Petition, which is of no moment to

anyone other than to United and that was never properly raised in another court below, the rationale behind this Court's GVR jurisdiction simply does not apply.

Instead, for all the reasons discussed *supra*, GVR authority does not extend to "arguments that were not the basis for the decision below." *Epstein*, 516 U.S. at 379. Limiting the ability of disappointed litigants to seek this Court's intervention is consistent with the prudential notion that this Court exercises its GVR authority "sparingly" with an eye to according proper "[r]espect for lower courts [and] the public interest in finality of judgments." *Lawrence*, 516 U.S. at 173-74. GVR jurisdiction does not offer an opportunity to create new issues for appeal that were not timely raised below. When a GVR is issued in light of an intervening decision, it is uniformly because the new decision "cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question." *Stutson v. United States*, 516 U.S. 163, 180 (1996) (Mem) (Scalia, J., dissenting). Here, no pertinent federal question had been presented or decided by the Mississippi Supreme Court.

United's singular example of a case where a GVR was granted in light of a decade-old U.S. Supreme Court decision, *Youngblood v. West Virginia*, 126 S.Ct. 2188 (2006), does not help its cause. Pet. at 20. Unlike here, the Petitioner in *Youngblood* "clearly presented a federal constitutional Brady claim to the State Supreme Court, as he had to the trial court" and the "dissenting justices discerned the significance of the issue raised," and thus addressed it. *Id.* at 2190.

Similar presentation and analysis did not occur in this case before the Mississippi Supreme Court.

This case is also unlike *Lords Landing Vill. Condo. Council v. Continental Ins. Co.*, 520 U.S. 893 (1997), which was also invoked by United. Pet. at 22-23. In *Lords Landing*, this Court issued a GVR because the Fourth Circuit had interpreted a key phrase in a Maryland law to reach a particular result. Eleven days before the Fourth Circuit reached its decision, and unknown to any of the parties in the case, the Maryland Court of Appeals issued an authoritative interpretation of the same phrase in the same statute – one that suggested a different result. This Court found it necessary to issue the GVR to conform the federal judgment *applying state law* to the authoritative construction of that law by that State's highest court. *Id.* at 896-97. Thus, the *Lords Landing* decision does not "resemble[]" this case, as United contends. Pet. at 22. Instead, it follows the standard requirement that the issue must be presented and decided below before this Court will assume jurisdiction and utilize its GVR authority.

Nor can United's failure to raise any issue concerning harm to nonparties properly below constitute a form of excusable neglect. Mississippi has adopted the same standard for excusable neglect as is followed in the Fifth Circuit. Under that standard, "simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice" to show excusable neglect. *Watters v. Stripling*, 675 So.2d 1242, 1243 (Miss. 1996), quoting *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993) (citation omitted).

Ignorance of the law – or of this Court's precedents – does not provide a basis for a claim of excusable neglect. Under Mississippi's cognate provision to Rule 60, it has said that "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *Kirk v. Pope*, --- So.2d ----, 2007 WL 4260123 at *11 (Miss. Dec. 6, 2007) (quotations and citations omitted). Simply put, "ignorance of the rules, or ignorance of the law" cannot justify reconsideration. *Id. See also Webb v. James*, 147 F.3d 617, 622 (7th Cir. 1998) (involving failure to conduct research and unfamiliarity with a relevant decision of this Court).

United's recent discovery of this Court's decision in *Williams* provides no basis for further review of this judgment given United's failure to raise any pertinent issue at trial, its failure to raise the issue in its appeal to the Mississippi Supreme Court, and its asserted justification of "simply" being unaware of the decision. United has presented no extraordinary circumstance excusing its neglect.

III. The Equities Involved in this Matter Do Not Favor a GVR Here

The final refuge invoked by United seeks to revive this case rests on the claim that the equities of the case favor the grant of a GVR here. Pet. at 25-29. In so arguing, it ignores all that came before its Petition in this matter in order to reach the answer it wants. As United acknowledges, a GVR may be refused where the requesting party engaged in "unfair or manipulative litigation" tactics or caused undue and unfair delay, Pet. at 25-26, relying on *Lawrence*, 516 U.S. at 167.

United claims it did not engage in such tactics with respect to the issue raised in its Petition because the "simple (and honest) response [is] Counsel just didn't know about *Williams* until after opportunities to raise it had passed." Pet. at 26. Respondent has no way of judging the truth of this claim and has no reason to doubt its accuracy, but believes that United's repeated instances of litigation misconduct throughout the course of this matter, including withholding discoverable materials (R., Vol. 6 at 801-02; Tran., Supp. Vol. 1, 34-36), suggest that the equities of the case strongly favor permitting this matter, which has dragged on for seven years in litigation, to reach an end. In fact, the relevant time period is actually more than a decade, considering that Natalie's claim was filed in 1997 and, according to United's sales representations, should have been paid within 30 days. Tran. Vol. 27 at 281-83; Vol. 30 at 681; and Ex. CC-4).

United failed to conduct timely discovery and engaged in gross discovery misconduct. R., Vol. 6 at 801-02. It repeatedly engaged in dilatory tactics. It removed the action to federal court, even though the parties did not satisfy the requirement of complete diversity, further delaying trial of the case in state court. It repeatedly told the trial court that it did not need to conduct discovery, only to change its mind on the eve of each new trial date. Trial was continued five separate times, often over Merrill's objections. This misconduct makes United a particularly poor candidate to receive the benefit of an exercise of this Court's discretion.

Moreover, the perpetrator of that misconduct, which engaged significant resources to defend this lawsuit, should not be the beneficiary of any

balancing of the equities. Doing so would encourage the use of such tactics "to stall private litigants in the knowledge that justice delayed will be justice denied." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 627 (1983). The only just reward for United's strategy of delay and denial is a denial of their Petition and an end of this litigation.

IV. United's Failure to Request a Jury Instruction on Harm to Nonparties is Fatal to their Argument on the Merits

Even assuming *arguendo* that United properly preserved an issue relating to the proper use of evidence or argument that posed an "unreasonable and unnecessary" risk that the jury punished it for harm United visited upon nonparties, United cannot claim that the trial was conducted at a variance from what this Court determined was required in *Williams*. *Williams* establishes that a distinction must be maintained between considering harm to others for reprehensibility purposes and using that harm as a basis for direct punishment by multiplying the compensatory damages by a number representing harmed nonparties.

In establishing that distinction, this Court resolved a question left open as decision in *BMW of No. Amer., Inc. v. Gore*, 517 U.S. 559 (1996). That open question was whether it was proper to multiply a compensatory damage award by the number of similarly affected in-state consumers. 127 S.Ct. at 1063. It found that such a calculation was improper. Thus, the practical import of the Court's ruling in *Williams* is a jury may not multiply the compensatory damage award of a single plaintiff by the number of presumed in-state victims, as a

footnote in *BMW* appeared to authorize. At the same time, *Williams* endorsed a jury's consideration of the fact that the plaintiff "and his misfortune were merely exemplars of the harm that [the defendant] was prepared to inflict on the [relevant] public at large." *Williams,* 127 S.Ct. at 1064 (citation omitted). The record citations proffered by United, never assigned as error in its appeal to the Mississippi Supreme Court, do no more than that – hold Merrill out as an exemplar of the harm United was prepared to inflict.

No evidence was adduced to show how many claims United denied, even when a United employee provided testimony suggesting that up to 95% of claims filed within two years of purchase of the policy were denied. Thus, there is no danger that the compensatory damages found appropriate here directly punished for harm to others.

The assessment of $900,000 in punitive damages found appropriate by the jury – *and by each and every reviewing judge from the trial court to the state supreme court* – amounted to less than two times the compensatory damages awarded by the jury. Pet. at 8a. It is difficult to imagine how that small ratio can represent improper multiplication on the basis of harm to nonparties.

Nor did counsel's closing statement deviate from what is permissible. Punitive damages serve two essential purposes: punishment and deterrence. *See BMW,* 517 U.S. at 568. In *Williams,* this Court reaffirmed that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Williams,* 127 S.Ct. at 1062, quoting

BMW, 517 U.S. at 568. Mississippi law permits punitive damages in insurance bad-faith cases "to punish the insurer" who wrongfully denied the claim without an arguable basis and "to deter it from engaging in similar actions in the future," as well as to "serve as a deterrent for others." Pet. at 45a, quoting *Andrew Jackson Life Ins. Co. v. Williams,* 566 So. 2d 1172, 1190 (Miss. 1990). It also recognizes that the plaintiff in such a case serves as a kind of private attorney general and performs a "public service in holding the insurer accountable." *Id.*, quoting *Williams,* 566 So. 2d at 1190. Closing argument in this case did little more than track established law, albeit more colorfully.

Critically, three punitive damage instructions requested by United were given by the trial judge. Those instructions told the jury that any punitive damages awarded must be "reasonably related to the actual damages sustained by Plaintiff Natalie Merrill," are not awarded to compensate any injury, and "should be based on the wrong done rather than on the status of the defendant." R. Vol. 18 at 2670, 2672, 2675. The court, also at United's request, advised the jury of the aggravating factors used in reprehensibility analysis as articulated by this Court in *State Farm*. R. Vol. 18 at 2675, utilizing *State Farm,* 538 U.S. at 419.

Yet, despite being sufficiently aware of the issue to object to Merrill's "send-a-message" closing argument on grounds it now claims implied that Merrill was seeking to punish for harm to

nonparties,[7] United failed to request an instruction that would have clarified any potential confusion not already addressed in the other instructions given. In *Williams,* this Court made it clear that a trial judge must instruct the jury on the appropriate use of harm to nonparty evidence *only* when there is a significant danger that the jury would be confused about its legitimate use *and* in response to a proper request from the defendant. *Williams,* 127 S.Ct. at 1065. In the instant case, there was no request at all. This Court has acknowledged that the trial judge has no obligation to act in counsel's stead:

> A trial judge is a decision-maker, not an advocate. To force him out of his proper role by requiring him to coax out the arguments and imaginatively reframe the requested remedies for the counsel before him is to place upon him more responsibility than a trial judge can be expected to discharge.

Henry v. Mississippi, 379 U.S. 443, 463 (1965).

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[7] Respondent submits that United's argument that asking a jury to send a message amounts to a plea to punish for harm to others is an indefensible contention that goes well beyond being a "stretch."

Because United failed to ask for a clarifying instruction it only now thinks should have been given, a necessary prerequisite to coming within the *Williams* decision, *Williams* cannot provide any relief to United, even if its current complaints were not otherwise procedurally barred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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